

**COMMONWEALTH OF MASSACHUSETTS**

**NORFOLK COUNTY**

**SUPREME JUDICIAL COURT  
NO. DAR-**

**APPEALS COURT  
NO. 2020-P-1365**

**COMMONWEALTH**

**v.**

**MAREK KOZUBAL**

**APPLICATION FOR DIRECT APPELLATE REVIEW**

*Request*

Pursuant to Mass. R. App. P. 11, Marek Kozubal requests that this Court grant direct appellate review of his convictions.<sup>1</sup>

*Summary*

This case presents two issues that warrant direct appellate review. First, the operative portion of the statute of conviction G.L. c. 265, § 13B½ (indecent assault and battery on a person under 14 by a mandated reporter) passed in 2008 but has never been interpreted.

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<sup>1</sup> Kozubal was convicted of seven counts under G.L. c. 265, § 13B½, and one count of Indecent Assault and Battery on a Person Under 14. G.L. c. 265, § 13B. Tr.12:27, R.15-16. Record citations to the trial transcript will be “Tr.[volume]:[page]”. Citations to Kozubal’s record appendix and addendum filed in the Appeals Court will be “R.[page]”; Addendum “Add.[page]”.

Over repeated written and oral objections, the trial judge instructed that the statute covering “mandated reporters” applied to any “person paid to care for or work with a child in any public or private facility.” The instruction omitted the statutory qualifying language “or home or program funded by the commonwealth or licensed under chapter 15D.” Here, the allegations against Kozubal involved a non-student at a club event, open to the public and attended by both adult and child community members. Whether Kozubal fell within the ambit of a properly construed statute is directly at issue. Where the statute is one of general application, the Court should grant review to define the class of persons subject to the statute’s 10 year mandatory minimum.

Second, the trial judge erroneously denied Kozubal’s right to peremptorily challenge on the basis that the juror was a “minority.” This Court recently explained that even the more specific phrase “person of color” is not a cognizable category under the *Batson/Soares* regime: “[t]he test in Soares and Batson does not apply to challenges to members of all minority ethnic or racial groups lumped together, but

instead applies to challenges to ‘particular, defined groupings in the community.’”<sup>2</sup> “Minority” does not fall within *Batson/Soares*.

### **STATEMENT OF PRIOR PROCEEDINGS**

On July 8, 2019, the Superior Court (Cosgrove, J.) sentenced Kozubal to concurrent terms of 10 years to 10 years and 1 day in state prison for 7 convictions of Indecent Assault and Battery on a Person Under 14 by a Mandated Reporter, G.L. c. 265, § 13B½, and a consecutive 3 year period of probation for 1 conviction on Indecent Assault and Battery on a Person Under 14. G.L. c. 265, § 13B. Tr.12:27, R.15-16. Kozubal timely appealed. R.49. Kozubal’s multiple motions for stay of sentence were denied. Tr.12:35, R.15, 18–19.

### **SHORT STATEMENT OF FACTS RELEVANT TO THE APPEAL**

#### *Jury Selection*

The trial judge improperly denied the defendant’s peremptory challenge to Juror No. 245, Jason Pereira.<sup>3</sup> Tr.4:15, 32.

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<sup>2</sup> *Commonwealth v. Jackson*, No. SJC- 11341 (Feb. 4, 2021) (slip op. at 14–17).

<sup>3</sup> The stenographer removed juror names and replaced them with numbers without being ordered to do so. Kozubal moved to correct the record to include the names of jurors relevant to the issues on appeal. R.49.

He was a security guard at McLean Hospital whose wife worked at a law firm as a “CSI” regarding motor vehicle accident claims. Tr.4:21.

Referring to Mr. Pereira’s questionnaire, the first question counsel asked the juror was whether “you think children sometimes make false accusations of sexual assault? And your answer was no.” Tr.4:17. Mr. Pereira stated that he was a father of two and had several nieces and nephews. Tr.4:18. In his experience, children under 12 might falsely accuse someone of inappropriate touching out of confusion — “they may not have the sense of what exactly happened” — or based on what they saw on YouTube or television or “just to get attention.” Tr.4:18-19. But he drew a clear distinction between children under 12 (who might make false reports) and those over 12 — like the 13-year-old complaining witness in this case. Tr.4:19. To wit, “I would say that based off the age, if between 8 the ages of 12 and up, I would say that there would be more of a[n] effective knowledge on that -- that may be something that may be true, more th -- tending to the age of, you know, 12 and younger.” Tr.4:19. Defense counsel pressed him: “So, you're making a distinction: that a younger child may make a false accusation just based

on extraneous information. JUROR: Yes.” Tr.4:19. The corollary being that a child older than twelve would not make a false accusation based on extraneous information.

It was part of defense counsel’s trial strategy to suggest that Ann Gray<sup>4</sup> fabricated the allegations based on suggestive texts and photographs exchanged between her step-mother and Kozubal. Tr.8:14, 79-80.

After this answer, the trial judge rehabilitated the juror with a ten-line leading question about considering the evidence without preconceptions. The juror replied that he would. Tr.4:20–21.

The defense exercised a peremptory. Tr.4:23. The judge responded:

[THE COURT]:<sup>5</sup> I noticed that that is a minority juror. I think that's the second challenge of a minority juror.<sup>6</sup> So, I'm going to ask you to justify your challenge, please.

MS. McKINNON: Sure. Your Honor, my concern is that this juror has indicated that he has children and nieces and

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<sup>4</sup> A pseudonym.

<sup>5</sup> The transcript does not identify the trial judge as the speaker of these three sentences, but it is clear from the context.

<sup>6</sup> The trial judge later ruled that the first challenge — of an attorney who had been a prosecutor — was “well within the range of acceptable peremptory challenges.” Tr.12:34.

nephews and that while in his experience young children, out of confusion, may make certain allegations that he could see as false, that his initial answer was children 12 and up don't have that kind of confusion. And so, my concern is that based on being a father and being an uncle and his sort of initial instinctual belief that children of that age wouldn't make false allegations, that is the reason.

THE COURT: Okay. I find the response to be both pretextual and inadequate. The juror will be seated. Your objection is noted.

Tr.4:23.

*Facts at trial*

After trial, Kozubal was convicted of indecently touching Gray on June 24, 2016, on June 25, 2016, and on July 6, 2016.

In the light most favorable to the verdict, there were indecent touchings on those three distinct dates, involving kissing, touching of breasts, and one touching of Gray's vulva area. Tr.6:18, 21, 53, 58, 60. The first two incidents occurred in the Clay Observatory, a part of Dexter Southfield School and the third incident occurred at Gray's home. Tr.6:28, 53.

The evidence was that Kozubal met Gray and her parents in January 2016 at a Brookline Adult Education course on ham radio held at the Clay Observatory. Tr.5:56-57. During the class, they struck up a

friendship and Gray's parents gave Kozubal a card with contact information for all three of them. Tr.5:60. Kozubal sent a text, "Hello from Marek!" to all three. Tr.5:61. After, Kozubal began texting with them. Tr.5:65, 8:16. Both Gray's parents and Kozubal lived polyamorous lifestyles. Tr.5:104-105. Kozubal briefly entered into a sexual relationship with Gray's mother which ended in June. Tr.8:14.

Kozubal also texted with Gray with the knowledge of Gray's parents, reporting things to them that she said. Tr. 8:17. They were concerned about her flirtatious texts, while he "didn't seem like he was doing anything. He was just talking back and sending her science news links and talking about his day." Tr. 8:18. They discussed it, he recognized that she was somewhat socially awkward, and he promised to redirect her. Tr. 8:20-21.

Meanwhile, the family earned their ham radio licenses and continued to explore ham radio in the community. Tr.5:58 At a ham radio event from June 24–26, 2016 held at the Clay Center, Kozubal was alone with Gray on several occasions. On June 24, he kissed her three times and touched her breasts over her clothing twice. Tr.6:18-25. Between June 25 to 26, he kissed her three times and touched her

breasts twice; once over her clothing and once under her clothing. Tr.6:29, 33-35.

A third incident involved Kozubal coming to the Gray home on July 6. Tr.6:50. Gray's parents were annoyed with each other, leaving Gray alone. Tr.6:51. Kozubal and Gray went to the basement where he kissed Gray, put his mouth on her breasts, and touched her vulva under her clothes. Tr.6:52-61.

The Commonwealth relied primarily on the testimony of Gray (that Kozubal indecently touched her as alleged) and on text messages introduced into evidence (suggesting a romantic relationship and euphemisms for kissing). Tr.5:58-82, Tr.6:18-60. It also relied on the testimony of Gray's stepmother and father. Tr.7:108-119, Tr.8:7-57, Tr.9:155-166.

Kozubal challenged Gray's credibility as someone experiencing emotional and psychological difficulties exacerbated by a stressful relationship between her father, stepmother, and biological mother, including a pending divorce at the time of the allegations. Tr.6:86-113. He also cast doubt on the electronic evidence, as Gray's father accessed her devices before turning them over to police. Tr.8:99, Tr.9:160-161.

*Whether Kozubal was a mandated reporter on June 24-26, 2016*

Kozubal was hired in 2003 “as a faculty member and assistant to the director of the Clay Center observatory.” Tr.9:14. The Clay Center observatory is a research-grade observatory, from which local universities often rent time for their students. Tr.8:135. The center, as a whole, houses the telescope as well as science and technology, afterschool, community, and club programs. Tr.8:119, 121.

Faculty are typically defined as employees who are instructing students and have direct contact with students. Tr.9:12. Kozubal was considered faculty beginning in 2003, supporting the technology for Clay Center programs but also occasional substitute teaching and afterschool programs. Tr.8:123–27. Kozubal was hired because of his unique skills to help run the observatory. Tr.8:135. Initially, supporting the operation of the observatory was his primary role: programming the associated computer, and maintaining the equipment, sensors, and the dome. Tr.8:136–37.

Kozubal’s position at the school at the time of the offenses in 2016 was vague. The school does not offer contracts; they use “renewal letters” and the latest renewal letter on file for Kozubal was March 11,

2011. Tr.9:23. In 2016, he was paid hourly, but the records do not say what he was paid for. Tr.9:24; Tr.8:139. He was part-time. Tr.8:138. There was no evidence that he had a job title. Tr.8:130. The school's director of human resources could not say that he was working for the afterschool programs. Tr.9:24–25. She could only say that he was working part-time. *Id.*

Gray was not a student at Dexter Southfield. She was home schooled. Tr.7:108. On June 24–26, Gray was attending a multi-day “Field Day” event at the observatory as part of a ham radio club event, attended by 20–40 children and adults from the community. Tr.5:69; Tr.6:11-12, 91–92; Tr.8:28-29. The event was different from the “field day” held by the school for its students and it was not during the academic year. Tr.9:27.

The event on June 24–26 was not part of the Brookline Adult Education classes that Gray's family took; those occurred months earlier. Tr.9:35–36, 40. Field Day was an event where ham radio operators contact each other around the world. Tr.6:11-12.

The event was organized by the ham radio club. Tr.5:69. Gray's mother testified that Kozubal told her that he was a “titled” member of

the club, and that it was part of his job with the afterschool program. Tr.7:118; *see* Tr.8:125. Kozubal was paid to work with the radio club. Tr.8:126. The radio club was run by the faculty, students, and an outside organization. Tr.8:139. And people from the community participated. Tr.8:140.

The incident on July 6 did not involve the Clay Observatory or Dexter Southfield at all. Tr.8:23–24, 37; Tr.6:50–51, 95.

**STATEMENT OF THE ISSUES OF LAW**  
**RAISED BY THE APPEAL**

1. Kozubal peremptorily challenged a juror who believed that children older than twelve would not make a false accusation. The judge ruled that counsel had engaged in a two-juror pattern of challenging “minority” jurors. “Minority” is not a cognizable group under Soares-Batson jurisprudence. Further, counsel’s explanation was group-neutral and case-specific. In contrast, the judge’s ruling was perfunctory, containing no findings regarding adequacy or genuineness of counsel’s response, nor any explanation of the judge’s reasoning. Did the trial judge improperly deny Kozubal’s peremptory challenge?

2. The judge erroneously instructed jurors that a mandated reporter is simply a “person paid to care for or work with a child in any public or

private facility.” This instruction improperly removed statutory terms limiting this class to government-funded or licensed programs. The evidence did not show what Kozubal was paid to do. Kozubal worked part-time at an observatory within a private school. Given those facts, could a properly instructed jury have determined that Kozubal did not fall within the scope of the statute?

3. Kozubal’s appeal raises three additional issues not argued in this application. First, the prosecutor made false assertions in closing regarding witness testimony about Kozubal’s role as faculty, shifted the burden of proof and violated Kozubal’s right not to testify. Second, certain text messages between the Kozubal and Gray were hearsay and did not fall within any evidentiary exception. Third, the admission of “cut and paste” excerpts from the school’s handbook without review to determine whether they were misleading constituted error.

### **STATEMENT REGARDING PRESERVATION OF THE ISSUES**

Both issues raised by this application are preserved. As to the other issues presented by Kozubal’s appeal, the closing argument issue is unpreserved while the hearsay argument and the argument regarding the school handbook are both preserved.

## ARGUMENT

- I. **The judge erroneously instructed jurors that a mandated reporter is simply a “person paid to care for or work with a child in any public or private facility.” This instruction improperly removed statutory terms limiting this class to specific government funded or licensed programs. Kozubal worked part-time at an observatory within a private school. The evidence did not show what Kozubal was paid to do. A properly instructed jury could have determined that Kozubal did not fall within the scope of the statute.**

Kozubal was convicted of violating G.L. c. 265, § 13B½, punishing indecent assault and battery on a child by a mandated reporter with a mandatory minimum of ten years in state prison. Kozubal extensively litigated the reach of the statute, arguing vagueness, the rule of lenity, and sufficiency. R.32.<sup>7</sup>

The issue here goes beyond this Court’s discussion of “professional capacity.” *Gomes*, 483 Mass. at 128. Here, the issues are whether Kozubal was a mandated reporter at all and whether “mandated reporter” was correctly defined for the jury. The police officer-defendant in *Gomes* was conceded to be a mandated reporter. *Id.* at 128. Here,

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<sup>7</sup> This Court has subsequently limited the statute to actions taken in one’s “professional capacity.” *Commonwealth v. Gomes*, 483 Mass. 123, 128 (2019). As a result, the Commonwealth has conceded that Kozubal must be resentenced on two counts where the jurors answered a special question that Kozubal was not acting in his official capacity. Tr.11:4–6.

Kozubal disputed whether he was a “teacher” or even a “person paid to care for or work with a child in any public or private facility” within the scope of the definitional statute at the time of the offenses. G.L. c. 119, § 21.

*A. Facts*

The relevant facts are recited *supra* at 9–11. In brief, Kozubal vigorously challenged the allegation that he was a mandated reporter within the meaning of the statute. Tr.4:52-63. He adduced evidence that his role at Dexter Southfield was undefined and, if anything, focused on the research observatory.<sup>8, 9</sup> He also adduced evidence that, even if he was a mandated reporter, he was not acting within the scope of a mandated reporter at the time of any of the offenses.<sup>10</sup>

*1. Analysis*

The jury was instructed over objection that a mandated reporter is “either a person who is a public or private schoolteacher or a person paid to care for or work with a child in any public or private facility.” Tr.10:9, 56, 69; Tr.9:175–76.

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<sup>8</sup> Tr.8:123–27, 130, 135–39. Tr.9:12, 14, 23–24 (Kozubal’s role).

<sup>9</sup> Tr.8:119, 121, 135 (describing observatory).

<sup>10</sup> Tr.5:69; Tr.6:11-12, 50–51, 91–92, 95; Tr.7:108, 118; Tr.8: 23–24, 28-29, 37, 125–26, 139–40; Tr.9:27, 35–36, 40.

Kozubal consistently argued that defining a mandated reporter as a “person paid to care for or work with a child in any public or private facility” erroneously truncates the statute. *See, e.g.* Tr.4:53-55; Tr.5:12; Tr.9:175–76. The full clause at issue defines one type of mandated reporter as a:

person paid to care for or work with a child in any public or private facility, or home or program funded by the commonwealth or licensed under chapter 15D that provides child care or residential services to children or that provides the services of child care resource and referral agencies, voucher management agencies or family child care systems or child care food programs.

G.L. c. 119 § 21. Indeed, the Legislature added the precursor of the above clause all at once, suggesting that the clauses are to be read together, not separately.<sup>11</sup>

Further, the Department of Children and Families (DCF) issued a regulation based on this statutory text, but inserted semi-colons rather than commas to make clear that “person paid to care for or work with a child in any public or private facility” is not a standalone, broad

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<sup>11</sup> *See* St. 1986, c. 230, § 1 (amending G.L. c. 119, s. 51A, as then in force, by inserting, after the word “worker”, the above-quoted language through “to children”); St. 1989, c. 219; G.L. c. 119, § 51A (2006 Official Ed.).

category of mandated reporter. The regulation defines mandated reporter as a

public or private school teacher; educational administrator; guidance or family counselor; day care worker or any person paid to care for or work with a child in any public or private facility, **or home or program funded by the Commonwealth or licensed pursuant to the provisions of M.G.L. c. 28A,**<sup>12</sup> which provides day care or residential services to children or which provides the services of child care resource and referral agencies, voucher management agencies, family day care systems and child care food programs; probation officer; clerk/magistrate of the district courts . . .

110 C.M.R. 2.00. As the bolded section shows, the phrase “any person paid to care for or work with a child in any public or private facility” is limited by the phrase that follows it. *See Commonwealth v. Larose*, 483 Mass. 323, 333–34 (2019) (employing transportation regulations to narrow scope of vague statutory term “lane”).

A contrary interpretation would make a huge swath of the public into mandated reporters. Employees of, e.g., restaurants, video game stores, and amusement parks would all be mandated reporters. Tr.9:176. These are all people “paid to care for or work with a child in any public or private facility.”

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<sup>12</sup> G.L. c. 28A has since been repealed and replaced with essentially identical language with chapter 15D, § 1*et seq.*

Further, leaving “person paid to care for or work with a child in any public or private facility” unmodified by the words that follow would lead to grammatically nonsensical results. It would define a mandated reporter to be “a person who is” a “home or program,” which would be both grammatically incomprehensible and duplicative of section (v) of the statute which includes a person “in charge of” specified organizations.

At a minimum, DCF’s (correct) contrary construction demonstrates that there is at least an ambiguity in the scope of the statute. Therefore, the doctrine of lenity would require the ambiguity be resolved in defendant’s favor. *Commonwealth v. Zapata*, 455 Mass. 530, 535 (2009); *Commonwealth v. Manolo M.*, No. SJC-12967, 2021 WL 245736, at \*6 (Mass. Jan. 26, 2021); *compare Commonwealth v. Gernrich*, 476 Mass. 249, 257 (2017) (rule of lenity applied to whether statutory term “police officer” included “deputy sheriff”).

Even if the jury could have found that Kozubal was a “private school teacher,” reversal is still required because they were also permitted to rest their verdict on the above-described invalid theory of guilt. The jurors were not asked to differentiate the theory of guilt in

their verdicts. *Yates v. United States*, 354 U.S. 298, 312 (1957); *Commonwealth v. Johnson*, 45 Mass.App.Ct. 473, 477 (1998) (applying *Yates*, 209A violation instruction permitted conviction on both proper and improper theories).

**II. The trial judge improperly denied Kozubal’s peremptory challenge. The juror believed that children older than twelve would not make a false accusation. Kozubal struck the juror. The judge ruled that counsel had engaged in a two-juror pattern of challenging “minority” jurors. “Minority” is not a cognizable group under Soares/Batson jurisprudence.**

*A. Facts*

The facts are set out *supra* at 3–6.

*B. Analysis*

The judge erred in disallowing Kozubal’s peremptory challenge. *Commonwealth v. Hyatt*, 409 Mass. 689, 691–92 (1991). There is a strict protocol to be followed when evaluating a peremptory challenge. There must be (1) an objection, (2) a prima facie finding of discrimination against a “discrete” group, (3) a request for an “adequate” explanation (specific, group-neutral, personal to the juror, related to the case), and (4) specific rulings as to whether the proffered explanation is adequate and whether it is a pretext. *Commonwealth v. Benoit*, 452 Mass. 212,

218–21 (2008). Steps 2-4 are at issue in Kozubal’s appeal. Kozubal focuses here on step 2.

As a matter of law, a *Soares/Batson* objection did not lie because “minority” is not a discrete group. *Gray v. Brady*, 592 F.3d 296, 305–06 (1st Cir. 2010). Well before Kozubal’s trial, this Court held:

We have previously noted that “[t]he test in *Soares* and *Batson* does not apply to challenges to members of all minority ethnic or racial groups lumped together, but instead applies to challenges to ‘particular, defined groupings in the community.’” *Prunty*, 462 Mass. at 307 n.17, quoting *Commonwealth v. Soares*, 377 Mass. 461, 486, cert. denied, 444 U.S. 881 (1979). See *Gray v. Brady*, 592 F.3d 296, 305-306 (1st Cir.), cert. denied, 561 U.S. 1015 (2010) (explaining that African-American and Hispanic jurors are not part of same “cognizable group” for *Batson* purposes).

*Commonwealth v. Ortega*, 480 Mass. 603, 608 n.8 (2018) (emphasis added). This Court reaffirmed this holding last week, criticizing objections to strikes against “people of color” as “vague” and “diffuse.” *Commonwealth v. Jackson*, No. SJC- 11341 (Feb. 4, 2021) (slip op. at 14–17).<sup>13</sup>

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<sup>13</sup> In *Jackson*, the trial judge was finally able to evaluate the objection after the objection was narrowed to discrimination against “Hispanic” people. *Jackson*, *supra* at 14–17).

“Minority” is simply too broad to evaluate prima facie discrimination. It makes it nearly impossible to frame a response to the objection. “Minority” includes race, ethnicity, gender, and religion. If the objection intones “minority,” is counsel responding to perceived discrimination against Catholics or Hispanic people? Jews or women? Black people or Asian people? Counsel is unable to defend against an alleged pattern of discriminatory strikes because he was no idea which pattern it might be.

Finally, “minority” makes it impossible to ferret out an impermissible motivation because different minorities suffer from different and even opposing stereotypes: one may be characterized as greedy and industrious, while another is characterized as lazy and dumb. As a matter of law, logic, and policy, “minority” cannot be a *Batson/Soares* category.

Disallowing a defense challenge based on supposed discrimination against a non-cognizable category requires reversal. *Commonwealth v. Wood*, 389 Mass. 552, 564 (1983) (age); *Commonwealth v. Evans*, 438 Mass. 142, 149, *cert. denied*, 538 U.S. 966 (2003) (students);

*Commonwealth v. Matthews*, 406 Mass. 380, 389 (1990) (suburban parents, caretakers of adolescent children).

Further, “the totality of the relevant facts” did not give rise to an inference of discrimination, *Commonwealth v. Sanchez*, 485 Mass. 491, 511 (2020), against a “discrete” group. *Benoit*, 452 Mass. at 218–21.

The trial judge recognized that counsel’s first strike of a “minority” juror was legitimate, because that juror (Juror 10) was a former prosecutor and had a close friend who was assaulted in high school and he believed them. Tr.2:38-39; Tr.12:34

Even assuming every other juror in the venire besides Pereira was non-“minority,” there was no discrimination against “minorities.” Defense counsel used peremptory strikes to excuse six non-“minority” jurors (jurors 9, 21, 51, 59, 82, and 236) who equivocated regarding whether children make false allegations but affirmed they would be fair. Tr.2:34–37, 67–68; Tr.3:26–28, 59–60, 66, 107, 193. There was not a “likelihood” that Pereira was “being excluded from the jury solely by reason of their group membership.” *Wood*, 389 Mass. at 560.

Finally, defense counsel’s explanation was clearly adequate: specific, personal to the juror, group-neutral, and related to the case.

*Benoit*, 452 Mass. at 219. The explanation pointed specifically to the juror’s statements suggesting that he would be inclined to disbelieve that Gray’s testimony was a false accusation. Tr.4:23 *Compare Garrey*, 436 Mass. at 429 (claim that black juror’s mere occupation as guidance counselor meant she would be sympathetic held adequate).

In contravention of *Benoit*, the judge failed to provide any “explanation” as to why the explanation was inadequate. 452 Mass. at 220 (such findings are “imperative”); Tr.4:23. Where counsel’s stated rationale was the same used for striking non-“minority” jurors, counsel’s reasoning was manifestly genuine. *Commonwealth v. Green*, 420 Mass. 771, 778 n.7 (1995);<sup>14</sup> *Hyatt*, 409 Mass. at 691–92.

The strike was proper. The judge clearly erred. It should not have been disallowed. Kozubal is entitled to a new trial.

**STATEMENT OF REASONS**  
**WHY DIRECT APPELLATE REVIEW IS APPROPRIATE**

Both issues presented in this petition are novel, are constitutional questions, have broad application, and the lower courts would benefit

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<sup>14</sup> *Overruled on other grounds, Commonwealth v. Britt*, 465 Mass. 87 (2013)

from clear instruction from this Court. As such Kozubal's petition easily meets the standards set out in Mass. R. App. P. 11(a).

First, the definition of a "mandated reporter" under § 13B½ has not been interpreted previously. Trial counsel exhaustively preserved the legal issue and also vigorously challenged at trial whether Kozubal fell within the scope of the statute as a matter of fact. This Court should take the opportunity to properly define the scope of "mandated reporter" in the context of this criminal statute.

Second, this Court has repeatedly refined the *Batson/Soares* regime and accordingly instructed lower courts to follow proper procedure in applying it. *Jackson*, No. SJC-11341, *supra*; *Commonwealth v. Sanchez*, 485 Mass. 491, 509–514 (2020); *Commonwealth v. Oberle*, 476 Mass. 539, 545–47 & n.4 (2017); *Commonwealth v. Issa*, 466 Mass. 1, 8 (2013); *Commonwealth v. Benoit*, 452 Mass. 212, 218–21 (2008); *Commonwealth v. Maldonado*, 439 Mass. 460, 462–67 (2003). The Court should continue that endeavor by clarifying that the broad catch-all category of "minority" does not, as a matter of law, raise a sufficient *Batson/Soares* objection.

Finally, the stakes are high for Kozubal. A man with literally no prior record, he is serving a mandatory minimum ten year sentence. R.49. Even the trial judge expressed misgivings regarding the harshness of the sentence. Tr. 12:26.

### **Conclusion**

The law is unclear and the stakes are high. This Court should grant Kozubal's petition for direct appellate review, clarify the law, and reverse his convictions.

Respectfully submitted,



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Certificate of Service

I hereby certify that on February 12, 2021, I served a copy of the foregoing (with attachments) on ADA Tracey Cusick, Norfolk County District Attorney, 45 Shawmut Road, Canton, MA 02021 via e-file.



David J. Nathanson

Certificate of Compliance

I hereby certify that the application in this matter complies with the rules of court that pertain to the filing of such petitions, including but not limited to: Mass. R. App. P. 11(b), Mass. R. App. P. 16; and Mass. R. App. P. 20. The brief is produced in 14 point Century Schoolbook and the argument as defined by Mass. R. App. P. 11(b)(5) contains 2,000 words.



David J. Nathanson

**1682CR00289 Commonwealth vs. Kozubal, Marek Janusz**

- Case Type:
- Indictment
- Case Status:
- Open
- File Date
- 09/08/2016
- DCM Track:
- B - Complex
- Initiating Action:
- INDECENT A&B ON CHILD UNDER 14, AGGRAVATED c265 §13B½
- Status Date:
- 10/06/2016
- Case Judge:
- 
- 
- Next Event:
- 

<a href="#">All Information</a>	<a href="#">Party</a>	<a href="#">Charge</a>	<a href="#">Event</a>	<a href="#">Tickler</a>	<a href="#">Docket</a>	<a href="#">Disposition</a>
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**Docket Information**

<a href="#">Docket Date</a>	<i>Docket Text</i>	<a href="#">File Ref Nbr.</a>	<i>Image Avail.</i>
09/09/2016	Case assigned to: DCM Track B - Complex was added on 09/09/2016		
09/09/2016	Indictment(s) returned	1	<a href="#">Image</a>
10/06/2016	Attorney appearance On this date Jeffrey P. Wiesner, Esq. added as Private Counsel for Defendant Marek Janusz Kozubal		
10/06/2016	Event Result: The following event: Arraignment scheduled for 10/06/2016 02:00 PM has been resulted as follows: Result: Held as Scheduled		
10/06/2016	Defendant arraigned before Court.		
10/06/2016	Colloquy - Defendant advised of right to attorney		
10/06/2016	Defendant waives reading of indictment		
10/06/2016	Plea of not guilty entered on all charges.		
10/06/2016	Bail set at \$25,000.00 Surety, \$2,500.00 Cash. Conditions of Release on Bail: Stay away no contact with victims and witness; GPS with exclusion zones including victims home, work, school and the Dexter School, No unsupervised contact with children under 16 yo; No work, coaching, teaching or volunteering with children under 16 yo. BAIL TO BE TRANSFERRED FROM DISTRICT COURT.		
10/06/2016	ORDER: Commonwealth's Motion For Protective Order Regarding Discovery Of Digital Video Recordings Of Sain Interviews - ALLOWED copies sent	2	
10/06/2016	Commonwealth 's Statement of The Case - w/certificate of service	3	
10/06/2016	Commonwealth 's Motion for Discovery I - w/certificate of service	4	
10/06/2016	Order for the transmittal of Bail sent to the clerk of the Brookline DC Posting.		
10/07/2016	The following form was generated:		

	Order for Transmittal of Bail Sent On: 10/07/2016 12:37:40	
11/02/2016	Commonwealth 's Notice of Discovery II.	6
11/02/2016	Commonwealth 's Certificate of Service RE: P#7	7
11/21/2016	Event Result: The following event: Pre-Trial Conference scheduled for 11/21/2016 02:00 PM has been resulted as follows: Result: Held as Scheduled	
01/24/2017	Event Result: The following event: Pre-Trial Hearing scheduled for 01/24/2017 02:00 PM has been resulted as follows: Result: Held as Scheduled: D's oral motion to remove GPS DENIED after hearing Appeared: Prosecutor Norfolk County District Attorney Defendant Kozubal, Marek Janusz Attorney Wiesner, Esq., Jeffrey P. Attorney Yas, Esq., Anne S Ct Rep: D Keefer	
03/08/2017	Event Result: The following event: Pre-Trial Hearing scheduled for 03/08/2017 02:00 PM has been resulted as follows: Result: Held as Scheduled	
03/13/2017	General correspondence regarding Commonwealth's Discovery III- filed 3/8/2017	8
03/13/2017	Commonwealth 's Certificate of service - filed 3/13/2017	9
04/18/2017	Event Result: The following event: Pre-Trial Hearing scheduled for 04/28/2017 02:00 PM has been resulted as follows: Result: Rescheduled Reason: Joint request of parties. Rule 36 waived.	
05/25/2017	Event Result: The following event: Pre-Trial Hearing scheduled for 05/25/2017 02:00 PM has been resulted as follows: Result: Held as Scheduled Appeared: Prosecutor Norfolk County District Attorney Defendant Kozubal, Marek Janusz Attorney Wiesner, Esq., Jeffrey P. Attorney Yas, Esq., Anne S Ct Rep: D Chapin Clerk: S Irwin	
05/30/2017	Defendant 's Motion for relief from the protective order to the extent of allowing for the copying and transcription of the sain interview and to provide the video and transcript to Defendant's expert - This motion is Allowed with the following conditions. Defense counsel is to file the name of the stenographer and expert to whom copy is to be provided under seal. Defense counsel is also to instruct expert not to disseminate transcript. Defense counsel also to return any transcripts of SAIN interview to Commonwealth at the conclusion of the case. Finally, Commonwealth may have a copy of transcript but must bear the cost if there is one. (Pasquale, J) copies mailed	10
06/05/2017	Other 's Motion for Relief Answer from Defendants Attorney Jeffrey Wiesner Filed Under Seal - Impounded Draw	11
07/19/2017	Attorney appearance On this date Jennifer Ann McKinnon, Esq. added as Associate Private Counsel for Defendant Marek Janusz Kozubal	
07/19/2017	Event Result: The following event: Filing of Motions scheduled for 07/19/2017 02:00 PM has been resulted as follows: Result: Held as Scheduled: D's oral motion to seal Motion to Dismiss allowed; D's oral motion to travel to state of New Hampshire ALLOWED on the condition that D give notice to probation of dates of travel and recieve permission from probation before leaving state. Appeared: Prosecutor Norfolk County District Attorney Attorney McKinnon, Esq., Jennifer Ann Defendant Kozubal, Marek Janusz Attorney Yas, Esq., Anne S	

	Ct Rep: D Chapin Clerk: S Irwin	
07/19/2017	Defendant 's Motion to For Rule 17 Lampron/Dwyer Summons For DCF Recrds and Memorandum in Support thereof-- FILED UNDER SEAL	12
07/19/2017	Defendant 's Motion for Production of Automatic Discovery	13
08/14/2017	Event Result: The following event: Conference to Review Status scheduled for 08/14/2017 02:00 PM has been resulted as follows: Result: Held as Scheduled	
08/15/2017	Defendant 's Motion for Permission To Travel - ALLOWED, subject to the following additional conditions; 1.) Defendant will call probation daily & advise of where staying next. - 2.) He will not be on the grounds of any schoo, childrens playground, amusement park or attraction naturally attractive to children (Cosgrove, J.) copies sent to ada & attorney	14
08/15/2017	Affidavit of Of Counsel In Support of Motion for Permission To Travel - w/certificate of service	15
08/25/2017	Business Records received from Department of Children and Families - a letter.	16
10/17/2017	Opposition to to Defendant's " motion filed under seal for rule 17 lampron/dwyer summons for DCF records" filed by Norfolk County District Attorney filed under seal	17
10/18/2017	Opposition to to Defendant's motion for records pursuant to Rule 17 filed by Victim Witness filed 10/17/2017	18
11/01/2017	Event Result: Judge: Krupp, Hon. Peter B The following event: Motion Hearing scheduled for 11/01/2017 02:00 PM has been resulted as follows: Result: Rescheduled Reason: Joint request of parties	
11/14/2017	Event Result: Judge: Krupp, Hon. Peter B The following event: Motion Hearing scheduled for 11/14/2017 02:00 PM has been resulted as follows: Result: Held as Scheduled Appeared: Prosecutor Norfolk County District Attorney Defendant Kozubal, Marek Janusz Attorney Vaughan, Esq., Ruth Laney Attorney McKinnon, Esq., Jennifer Ann Attorney Wiesner, Esq., Jeffrey P Attorney Yas, Esq., Anne S Ct Rep: D Chapin Clerk: S Irwin  Judge: Krupp, Hon. Peter B	
11/14/2017	Norfolk County District Attorney's Memorandum in opposition to Defendant's "Motion Filed Under Seal For Rule 17 Lampron/Dwyer Summons For DCF Records" (supplemental memo)	19
11/15/2017	Defendant 's Request to file under seal and certificate of service - Allowed (Krupp,J) Attest: S. Irwin, a.c. - filed 11/15/2017 - UNDER SEAL	20
11/15/2017	Defendant 's Motion to strike affidavit and certificate of service - filed 11/15/2017 - UNDER SEAL	21
11/16/2017	Commonwealth 's Response To Defendant's Motion to Strike Affidavit	22
11/20/2017	Endorsement on Motion to strike affidavit, (#21.0): DENIED After hearing, Denied (11/17/2017) Copies mailed to ADA and Defense  Judge: Krupp, Hon. Peter B	
11/20/2017	Endorsement on Request to file under seal, (#20.0): ALLOWED dated 11/17/2017 - copy sent to ADA and Defense  Judge: Krupp, Hon. Peter B	
11/20/2017	MEMORANDUM & ORDER:  on Defendant's motion for Rule 17 Lampron/Dwyer summons for records - dated 11/17/2017 copies	23

	mailed to ADA and Defense Judge: Krupp, Hon. Peter B	
12/28/2017	ORDER: Protective Order For Defense Counsel - copy sent to ada & attorney Counsel Jennifer McKinnon Judge: Krupp, Hon. Peter B	24
12/28/2017	ORDER: Protective Order For Defense Counsel - copies sent to ada & attorney Counsel Jeffrey Wiesner Judge: Krupp, Hon. Peter B	25
01/08/2018	Defendant 's Request to file under seal - Allowed (Wilson,J ) Attest: S.Irwin, a.c. filed 12/22/2017 dated 1/8/2017	26
01/08/2018	Defendant 's Motion to dismiss indictments and certificate of service - FILED UNDER SEAL	27
01/08/2018	Marek Janusz Kozubal's Memorandum in support of motion to dismiss indictments - filed 1/8/2018	28
01/09/2018	Mental Health Records received from [REDACTED] (IMPOUNDED)	29
01/10/2018	Commonwealth 's Submission of filing of impounded information - filed 1/9/2018	30
01/10/2018	Opposition to to Defendant's motion to dismiss indictments filed by Norfolk County District Attorney filed 1/10/2018 - IMPOUNDED	31
01/11/2018	Event Result: Judge: Wilson, Hon. Paul D The following event: Non-Evidentiary Hearing to Dismiss scheduled for 01/12/2018 02:00 PM has been resulted as follows: Result: Rescheduled Reason: Joint request of parties	
01/29/2018	Defendant 's Notice of filing of impounded information - filed 1/26/2018	32
01/30/2018	ORDER: pursuant to uniform rules on impoundment procedure, Rule 8 dated 1/30/2018, Re: Defendant's reply to the Commonwealth's opposition to Defendant's motion to dismiss Judge: Wilson, Hon. Paul D	33
01/30/2018	Defendant 's Reply to the Commonwealth's opposition to Defendant's motion to dismiss - IMPOUNDED - filed 1/26/2018 Judge: Wilson, Hon. Paul D	34
02/07/2018	Event Result: Judge: Wilson, Hon. Paul D The following event: Non-Evidentiary Hearing to Dismiss scheduled for 02/07/2018 02:00 PM has been resulted as follows: Result: Not Held Reason: Request of Commonwealth	
02/16/2018	Defendant Jennifer Ann McKinnon, Esq.'s Application to File Motion Disclosing Content of Presumptively-Privileged Records Protected by Dwyer Protective Order	35
02/16/2018	Affidavit of of Counsel in Support of Defendant's Application to File Motion Disclosing Content of Presumptively-Privileged Records	36
02/28/2018	Event Result: Judge: Wilson, Hon. Paul D The following event: Non-Evidentiary Hearing to Dismiss scheduled for 02/28/2018 02:00 PM has been resulted as follows: Result: Held as Scheduled Appeared: Prosecutor Norfolk County District Attorney Defendant Kozubal, Marek Janusz Attorney McKinnon, Esq., Jennifer Ann Attorney Wiesner, Esq., Jeffrey P Attorney Yas, Esq., Anne S	

	Ct Rep: FTR Rm 1 approx start time 2:53 pm Clerk: S Irwin  Judge: Wilson, Hon. Paul D	
03/16/2018	Endorsement on Application to File Motion Disclosing Content of Presumptively-Privileged Records Protected by Dwyer Protective Order, (#35.0): ALLOWED  Judge: Connors, Hon. Thomas A	
03/19/2018	Defendant Jennifer Ann McKinnon, Esq.'s Motion for Rule 17 Lampron/Dwyer Summons for Additional Records w/attachments - Filed under seal (Connors, R.A.J.) B. Roche, a.c. IMPOUNDED  Judge: Connors, Hon. Thomas A	37
03/21/2018	ORDER: Protective order issued- all parties notified by Clerk B. Roche  Judge: Connors, Hon. Thomas A	38
03/28/2018	MEMORANDUM & ORDER:  on Defendant's motion to dismiss - Defendant's motion to dismiss (Docket No 27) is DENIED. dated 3/21/2018 Copies mailed to ADA and Defense.  Judge: Wilson, Hon. Paul D	39
03/28/2018	ORDER: Protective Order for Victim Rights ALLOWED by J. Connor, T on 3/26/2018 Attest: by B. Roche, Asst. Clerk  Judge: Connors, Hon. Thomas A	40
04/03/2018	Event Result: Judge: Cosgrove, Hon. Robert C The following event: Hearing RE: Discovery Motion(s) scheduled for 04/03/2018 02:00 PM has been resulted as follows: Result: Held as Scheduled	
04/05/2018	Commonwealth 's Motion to examine Lampron/Dwyer records - ALLOWED after hearing from both Commonwealth and counsel for victim (Cosgrove, J) dated 4/3/2018. Copies mailed to ADA and Defense	41
04/05/2018	Other 's Motion to allow inspection of minor victim's records - IMPOUNDED PENDANCY OF CASE - OK (Cosgrove, J) dated 4/3/2018	42
04/20/2018	Event Result: Judge: Cosgrove, Hon. Robert C The following event: Motion Hearing scheduled for 04/20/2018 02:00 PM has been resulted as follows: Result: Held as Scheduled	
04/20/2018	Event Result: Judge: Cosgrove, Hon. Robert C The following event: Filing of Motions scheduled for 04/30/2018 02:00 PM has been resulted as follows: Result: Canceled Reason: Court Order	
04/20/2018	Event Result: Judge: Cosgrove, Hon. Robert C The following event: Final Pre-Trial Conference scheduled for 05/23/2018 02:00 PM has been resulted as follows: Result: Rescheduled Reason: Joint request of parties	
04/20/2018	Event Result: Judge: Cosgrove, Hon. Robert C The following event: Jury Trial scheduled for 05/29/2018 09:00 AM has been resulted as follows: Result: Rescheduled Reason: Request of Defendant	
04/20/2018	Defendant 's Motion to Continue the Trial Date - After hearing, allowed as noted in open court - rule 36 is waived (Cosgrove, J) c/s ADA & Atty.	43
04/20/2018	Affidavit of of Counsel in Support of Motion to Continue the Trial Date	44
05/24/2018	ORDER allowing access to Privileged Documents by persons other than counsel.	45

	victim rights attorney - Breanishea Amga. Affidavit of father of victim allowing Breanishea Amaya, Esq of the victim rights law center to view and inspect any and all records. Anne Yas confirmed via email to Clerk Sue Irwin	
	Judge: Krupp, Hon. Peter B	
05/30/2018	General correspondence regarding Filing of Impounded Information (IMPOUNDED)	46
05/30/2018	Opposition to Defendant's Motion for Rule 17 Lampron/Dwyer Summons for Additional Records & Certificate of Service filed by	47
06/06/2018	Other 's Notice of filing of impounded information - Victim Witness' Opposition to Defendant's Motion for Dwyer/Lampron Additional Records filed by Breanishea Amaya, Esq	48
06/06/2018	Opposition to to Defendant's motion for records pursuant to Rule 17 filed by Victim Witness IMPOUNDED	49
06/06/2018	Defendant 's Certificate of service	50
06/06/2018	Commonwealth 's Notice of Discovery IV-Filed on 6/6/18 Applies To: Yas, Esq., Anne S (Attorney) on behalf of Norfolk County District Attorney (Prosecutor)	51
06/08/2018	Event Result:: Hearing on Dwyer Motion scheduled on: 06/12/2018 02:00 PM Has been: Rescheduled For the following reason: By Court prior to date Hon. Robert C Cosgrove, Presiding Appeared: Staff:	
06/29/2018	Event Result:: Hearing on Dwyer Motion scheduled on: 06/29/2018 02:00 PM Has been: Held as Scheduled Hon. Robert C Cosgrove, Presiding Appeared: Prosecutor Norfolk County District Attorney Anne S Yas, Esq., Breanishea Zhade Amaya, Esq., Defendant Marek Janusz Kozubal Jeffrey P Wiesner, Esq., Private Counsel Jennifer Ann McKinnon, Esq., Associate Private Counsel Staff: S Irwin A/C FTR L. Everett  Judge: Cosgrove, Hon. Robert C	
06/29/2018	Defendant 's Request To Filed Under Seal (Re: D's reply brief) filed and ALLOWED (Csogrove, J.) attest S Irwin A/C	52
06/29/2018	Defendant 's Reply To the Commonwealth and Victim Witness's Opposition to the Defendant's Rule 17 Motion IMPOUNDED per Cosgrove J. see paper #52	53
07/16/2018	Event Result:: Lobby Conference scheduled on: 07/16/2018 02:00 PM Has been: Held as Scheduled Hon. Robert C Cosgrove, Presiding Appeared: Staff:	
08/28/2018	Endorsement on Motion for Rule 17 Lampron/Dwyer summons for additional records, (#37.0): Other action taken After hearing, Allowed in part, Denied, in part. See Ruling filed this date (Cosgrove, J) dated 8/28/2018 - IMPOUNDED  Judge: Cosgrove, Hon. Robert C	
08/28/2018	MEMORANDUM & ORDER:  Ruling on Defendant's motion for Rule 17 Lampron/Dwyer Summons for additional records. ORDER: So much of the defendant's motion as seeks an order for production of any emails exchanged between	54 <a href="#">Image</a>

	<p>██████████ and ██████████ and/or ██████████ between August 1, 2015 to July 31, 2016 is allowed; the motion is otherwise denied. dated 8/28/2018 Copies mailed to ADA and Defense</p> <p>Judge: Cosgrove, Hon. Robert C</p> <p>Judge: Cosgrove, Hon. Robert C</p> <p>Judge: Cosgrove, Hon. Robert C</p>	
08/29/2018	<p>Event Result:: Final Pre-Trial Conference scheduled on: 10/09/2018 02:00 PM</p> <p>Has been: Rescheduled For the following reason: By Court prior to date</p> <p>Comments: with D's Assent Hon. Robert C Cosgrove, Presiding</p> <p>Appeared: Staff:</p>	
08/29/2018	<p>Event Result:: Jury Trial scheduled on: 10/16/2018 09:00 AM</p> <p>Has been: Rescheduled For the following reason: Request of Commonwealth</p> <p>Comments: with D's assent Hon. Robert C Cosgrove, Presiding</p> <p>Appeared: Staff:</p>	
11/28/2018	<p>ORDER: The Keeper of Records for the ██████████, is hereby ordered to produce copies of any and all emails exchanged between ██████████ and/or ██████████ and/or ██████████, and or ██████████ between August 1, 2015 through July 31, 2016. Said copied shall be produced to the Criminal Clerk's Office, Norfolk County Superior Court. 650 High Street, Dedham, MA 02026, by 12/12/2018 (Fishman, J)</p> <p>Judge: Fishman, Hon. Kenneth J</p>	55 <a href="#">Image</a>
12/19/2018	<p>Event Result:: Final Pre-Trial Conference scheduled on: 01/22/2019 02:00 PM</p> <p>Has been: Rescheduled For the following reason: Joint request of parties</p> <p>Hon. Kenneth J Fishman, Presiding</p> <p>Appeared: Staff:</p>	
12/26/2018	Commonwealth 's Notice Discovery V-Filed on 12/20/18	56
12/28/2018	Mental Health Recordsreceived from ██████████ (Impounded)	57
12/31/2018	Defendant 's Motion to Modify Protective Order to Allow for Disclosure of Presumptively Privileged Records to Defense's Forensic Psychiatrist Pursuant to Commonwealth v. Dwyer, 448 Mass 122 (2006)	58
12/31/2018	Affidavit of Jeffrey Wiesner in Support of Defendant's Motion to Modify Protective Order	59
12/31/2018	Affidavit of Bernard Katz, M.D.	60
01/02/2019	Docket Note: On this date paper #54 was mail to Atty. Jeffrey Wiesner	
01/14/2019	<p>Event Result:: Hearing RE: Discovery Motion(s) scheduled on: 01/14/2019 02:00 PM</p> <p>Has been: Rescheduled For the following reason: By Court prior to date</p> <p>Comments: SESSION ON TRIAL Hon. Maynard Kirpalani, Presiding</p> <p>Appeared: Staff:</p>	
01/14/2019	Commonwealth 's Joint Motion To Contunue Trial Date (with waiver of Rule 36) ALLOWED (Kirpalani, J) 01/16/2019 attest S Irwin a/c	61
01/14/2019	Commonwealth 's Memorandum in Opposition to Defendant's Motion to Modify Protective Order To Allow for Disclosure of Presumptively Preiviliged Records IMPOUNDED	62
01/14/2019	Commonwealth 's Notice of Filing of Impounded Information	63
01/16/2019	<p>Event Result:: Final Pre-Trial Conference scheduled on: 01/29/2019 02:00 PM</p> <p>Has been: Not Held For the following reason: Other event activity needed Hon. Maynard Kirpalani, Presiding</p>	

	<p>Appeared: Staff:</p>	
01/16/2019	<p>Event Result:: Jury Trial scheduled on: 02/05/2019 09:00 AM Has been: Not Held For the following reason: Other event activity needed Hon. Maynard Kirpalani, Presiding Appeared: Staff:</p>	
01/23/2019	<p>Event Result:: Hearing RE: Discovery Motion(s) scheduled on: 01/23/2019 02:00 PM Has been: Held as Scheduled Hon. Maynard Kirpalani, Presiding Appeared: Staff:</p>	
02/05/2019	<p>ORDER allowing access to Privileged Documents by persons other than counsel.  See Attached Order - Dated 2/5/2019  Judge: Kirpalani, Hon. Maynard</p>	64
02/25/2019	<p>Event Result:: Conference to Review Status scheduled on: 02/25/2019 02:00 PM Has been: Not Held For the following reason: Joint request of parties Hon. Maynard Kirpalani, Presiding Appeared: Staff:</p>	
03/28/2019	<p>Event Result:: Conference to Review Status scheduled on: 04/01/2019 02:00 PM Has been: Rescheduled For the following reason: Request of Defendant Hon. Maynard Kirpalani, Presiding Appeared: Staff:</p>	
04/09/2019	Defendant 's Request to File Under Seal (Motion to Release Records for Protective Order)	65
04/09/2019	Defendant 's Motion to Modify Protective Order to Allow for Copies of Presumptively Privileged Records to be Provided to Defense Counsel Pursuant to Commonwealth v. Dwyer, 448 Mass 122 (2006)	66
04/09/2019	Affidavit of of Jennifer McKinnon in Support of Defendant's Motion to Modify Protective Order to Allow for Copies of Presumptively Privileged Records to be Provided to Defense Counsel Pursuant to Commonwealth v. Dwyer, 448 Mass 122 (2006)	67
04/09/2019	Defendant 's Certificate of Service	68
04/09/2019	Defendant 's Request to File Under Seal	69
04/09/2019	Defendant 's Motion to Release Records from Protective Order	70
04/09/2019	Defendant 's Certificate of Service	71
04/16/2019	<p>Event Result:: Conference to Review Status scheduled on: 04/16/2019 02:00 PM Has been: Held as Scheduled Hon. Robert C Cosgrove, Presiding</p>	
04/19/2019	<p>Endorsement on Motion to Modify Protective Order to Allow for Copies of Presumptively Privileged Records to be Provided to Defense Counsel, (#66.0): ALLOWED By Agreement both the Commonwealth and the Defense May Obtain Copies (Cosgrove, J.) Dated 4/16/2019 Copies Sent to Commonwealth and Defense  Judge: Cosgrove, Hon. Robert C</p>	
05/03/2019	<p>Event Result:: Motion Hearing scheduled on: 05/03/2019 02:00 PM Has been: Held as Scheduled Hon. Robert C Cosgrove, Presiding</p>	
05/21/2019	Commonwealth 's Notice of Discovery VI - filed 5/21/2019	72

05/21/2019	Commonwealth 's Certificate of service - filed 5/21/2019	73
05/30/2019	Commonwealth 's Notice of Discovery VII	74
05/30/2019	Commonwealth 's Certificate of Service	75
05/30/2019	Commonwealth 's Motion in limine #1 to Allow In-Court Identification	76
05/30/2019	Commonwealth 's Motion in limine #2 to Allow First Complaint Evidence	77
05/30/2019	Commonwealth 's Motion in limine #3 to Preclude Reference to Victims' Parents' Polyamorous Sexual Practices	78
05/30/2019	Commonwealth 's Motion #4 Request for Voir Dire of Reputation Evidence Witnesses	79
05/30/2019	Commonwealth 's Motion #5 to Allow Portions of Defendant's Text Conversations with the Victim	80
05/30/2019	Commonwealth 's Motion in limine #6 to Exclude Mental Health Records, Treatment or Diagnosis of the Victim	81
05/30/2019	Commonwealth 's Certificate of Service	82
05/30/2019	Commonwealth 's Motion in limine #7 to Preclude Reference to any Alleged " Bad Character" and Any Alleged Prior "Misconduct" of the Victim	83
05/30/2019	Commonwealth 's Motion in limine #8 to Exclude DCF Presentation on Mandated Reporter	84
05/30/2019	Witness list  Commonwealth's List of Witnesses  Applies To: Yas, Esq., Anne S (Attorney) on behalf of Norfolk County District Attorney (Prosecutor)	85
05/30/2019	Commonwealth 's Motion for Attorney-Conducted Individual Voir Dire of Potential Jurors and Particular Topics  Applies To: Yas, Esq., Anne S (Attorney) on behalf of Norfolk County District Attorney (Prosecutor)	86
05/31/2019	Event Result:: Jury Trial scheduled on: 06/11/2019 09:00 AM Has been: Not Held For the following reason: Not reached by Court Hon. Robert C Cosgrove, Presiding	
05/31/2019	Event Result:: Final Pre-Trial Conference scheduled on: 06/05/2019 02:00 PM Has been: Not Held For the following reason: Not reached by Court Hon. Robert C Cosgrove, Presiding	
05/31/2019	Commonwealth 's Motion in limine #9 regarding forensic evidence and certificate of service - filed 5/30/2019	87
06/11/2019	Event Result:: Final Pre-Trial Conference scheduled on: 06/11/2019 02:00 PM Has been: Held as Scheduled Hon. Robert C Cosgrove, Presiding	
06/11/2019	Witness list  Commonwealth's Updated List of Witnesses  Applies To: Yas, Esq., Anne S (Attorney) on behalf of Norfolk County District Attorney (Prosecutor)	88
06/13/2019	Defendant 's Motion to Suppress Information Obtained Through Use of Unauthorized Subpoenas filed and denied after hearing. See Memorandum of Decision & Order of 06/17/19. (Parties notified with copy of decision).	89

06/13/2019	Commonwealth 's Motion in limine #3 to Preclude Reference to Victims' Parents Polyamorous Sexual Practices filed and Denied. See Memorandum of Decision filed 6/17/19. Cosgrove, J. Parties notified with copy.	93	
06/13/2019	Opposition to to the Commonwealth's Motion in Limine #3 filed. filed by	108	
06/13/2019	Defendant 's Motion in limine to Admit Presumptively Privileged Records and Opposition to Commonwealth's Motion in Limine #6 filed.	109	
06/13/2019	Defendant 's Response To Commonwealth's Motion in Limine #5 filed.	110	
06/13/2019	Opposition to to Defendant's Motion to Suppress filed by Norfolk County District Attorney	90	
06/13/2019	Commonwealth 's Motion in limine #1 to Allow In-Court Identification. Allowed. Cosgrove, J. Parties notified via email. 6/17/19	91	
06/13/2019	Commonwealth 's Motion in limine #2 to Allow First Complaint Evidence filed.	92	
06/13/2019	Commonwealth 's Motion in limine Request for Voir Dire of Reputation Evidence Witnesses filed and endorsed as follows: The defense having represented that it has no present intention of calling a reputation witness and that it will notify the Court and Commonwealth before so doing, the Court defers action on this motion. Cosgrove, J. (Parties notified).	94	
06/13/2019	Commonwealth 's Motion in limine #5 to Allow Portions of Defendant's Text Conversations with the Victim filed and Allowed, subject to defendant's right to raise objections to foundation/authentication. Cosgrove, J. (Parties notified).	95	
06/13/2019	Commonwealth 's Motion in limine #6 to Exclude Mental Health Records, Treatment or Diagnosis of the Victim filed and Allowed. See Memorandum of Decision dated 6/17/19. Cosgrove, J. (Parties notified with copy).	96	
06/13/2019	Commonwealth 's Motion in limine #7 to Preclude Reference to Any Alleged "bad Character" and Any Alleged Prior Misconduct of the Victim filed. See Memorandum of Decision dated 6/17/19. Cosgrove, J. (Parties notified with copy).	97	
06/13/2019	Commonwealth 's Motion in limine #8 to Exclude DCF Presentation on Mandated Reporter filed. 6/13/19 - No action taken at this time. Cosgrove, J. (Parties notified).	98	
06/13/2019	Commonwealth 's Motion in limine #9 Regarding Forensic Evidence filed. 6/13/19 - Agreed and Allowed. Cosgrove, J. (Parties notified).	99	
06/13/2019	Commonwealth 's Motion in limine #10 to Exclude Testimony of Department of Children and Families Investigators - Allowed. Cosgrove, J. (Parties notified).	100	
06/13/2019	Commonwealth 's Motion in limine #11 to Exclude Records and Testimony of Victim's Therapist filed and Allowed. Cosgrove, J. 6/17/19. (Parties notified with copies).	101	
06/13/2019	Commonwealth 's Motion in limine #12 to Exclude Records of Norfolk Probate Court filed and Allowed. Cosgrove, J. 6/17/19. (Parties notified with copies).	102	
06/13/2019	Commonwealth 's Motion in limine filed and Allowed in part as endorsed. Cosgrove, J. 6/14/19. (Copy emailed to parties).	103	
06/13/2019	Defendant 's Motion in limine to Exclude Evidence of Defendant's Pre-Arrest Silence filed and Allowed. The Detective may testify that she called, that the defendant answered the phone, and that they spoke. Details of the conversation are excluded. Cosgrove, J. (Parties notified).	104	
06/13/2019	Defendant 's Application to File Motions in Limine Disclosing Content of Presumptively Privileged Records Under Seal and Request for Sequestration Order filed. and Allowed. Cosgrove, J. (Parties notified via email).	105	
06/13/2019	Defendant 's Motion in limine to Exclude "Bad Act" Evidence filed. Agreed and Allowed. Cosgrove, J. (Parties notified via email).	106	
06/13/2019	Defendant 's Motion in limine to Preclude Use of the Term "Victim" or "Harassment Prevention Order" filed and allowed by agreement. Cosgrove, J. (parties notified via email).	107	
06/13/2019	Opposition to to the Commonwealth's Motion in Limine #7 filed. filed by Marek Janusz Kozubal	111	
06/13/2019	Event Result:: Final Pre-Trial Conference scheduled on: 06/13/2019 09:00 AM Has been: Held as Scheduled Hon. Robert C Cosgrove, Presiding		
06/17/2019	MEMORANDUM & ORDER:  Rulings on Various Pretrial Motions filed by the Court, Cosgrove, J. (Copy emailed to parties).	112	<a href="#">Image</a>

Judge: Cosgrove, Hon. Robert C		
06/17/2019	MEMORANDUM & ORDER:  Memorandum of Decision and Order on Motion to Suppress Information Obtained through Use of Unauthorized Subpoenas and to Suppress Defendant's Statements Obtained in Violation of the 5th and 6th Amendments, Art. 12 of the Massachusetts Declaration of Rights filed by the Court, Cosgrove, J. denying defendant's motion. (Copy emailed to parties).  Judge: Cosgrove, Hon. Robert C	113 <a href="#">Image</a>
06/17/2019	Commonwealth 's PROPOSED Motion for Jury Questionnaire	116
06/18/2019	Commonwealth 's Notice of Discovery IX and certificate of service - filed 6/18/2019	114
06/18/2019	Defendant 's PROPOSED Notice of jury questionnaire and proposed description of the case - filed 6/18/2019	115
06/18/2019	Event Result:: Jury Trial scheduled on: 06/18/2019 09:00 AM Has been: Held as Scheduled Hon. Robert C Cosgrove, Presiding	
06/19/2019	General correspondence regarding [REDACTED] Unable to find any subscriber information responsive to request.	117 <a href="#">Image</a>
06/19/2019	General correspondence regarding [REDACTED] - subscriber information obtained has been provided -	118 <a href="#">Image</a>
06/19/2019	General correspondence regarding [REDACTED] to produce certain subscriber records -	119 <a href="#">Image</a>
06/19/2019	Event Result:: Jury Trial scheduled on: 06/19/2019 09:00 AM Has been: Held as Scheduled Hon. Robert C Cosgrove, Presiding	
06/20/2019	Event Result:: Jury Trial scheduled on: 06/20/2019 09:00 AM Has been: Held as Scheduled Hon. Robert C Cosgrove, Presiding FTR Recorded	
06/21/2019	Event Result:: Jury Trial scheduled on: 06/21/2019 09:00 AM Has been: Held as Scheduled Hon. Robert C Cosgrove, Presiding FTR Recorded	
06/24/2019	Event Result:: Jury Trial scheduled on: 06/24/2019 09:00 AM Has been: Held as Scheduled Hon. Robert C Cosgrove, Presiding FTR Recorded	
06/24/2019	Defendant 's Motion to reinstruct the jury concerning the inference it may draw from a negative response to a question	120
06/25/2019	Event Result:: Jury Trial scheduled on: 06/25/2019 09:00 AM Has been: Held as Scheduled Hon. Robert C Cosgrove, Presiding FTR Recorded	
06/25/2019	Event Result:: Jury Trial scheduled on: 06/26/2019 09:00 AM Has been: Held as Scheduled Hon. Robert C Cosgrove, Presiding	
06/25/2019	Commonwealth 's PROPOSED Request for Redactions of Ipod messages with certificate of service	122 <a href="#">Image</a>
06/25/2019	Endorsement on Motion to reinstruct the jury concerning the inference it may draw from a negative response to a question, (#120.0): DENIED	<a href="#">Image</a>

	See Comm. vs. Judge, 420 Mass. 433, 452 n.12 (1995); see also Comm. vs. Bailey, 12 Mass. App. Ct. 104, n.2 (1981) Cosgrove, J.	
06/25/2019	ORDER: re: Ruling on Defendant's Motion to Release Records from Protective Order.	121 <a href="#">Image</a>
06/27/2019	Event Result:: Jury Trial scheduled on: 06/27/2019 09:00 AM Has been: Held via Video Conference Hon. Robert C Cosgrove, Presiding	
06/28/2019	Event Result:: Jury Trial scheduled on: 06/28/2019 09:00 AM Has been: Held as Scheduled Hon. Robert C Cosgrove, Presiding	
07/01/2019	Commonwealth 's Request Jury Instructions 1. Indecent Assault and Battery on a Child under 14 years by a Mandated Reporter 2. filed 6/27/2019	123
07/01/2019	Commonwealth 's Request jury instruction text messages - filed 6/27/2019	124
07/01/2019	Commonwealth 's Request for preliminary designation of verdict slips - filed 6//27/2019	125
07/01/2019	Defendant 's Motion for required finding of not guilty at the end of the Commonwealth's case - After hearing DENIED (Cosgrove, J) dated 6/27/2019. Copies mailed to ADA and Defense	126
07/01/2019	The defendant/petitioner is committed without bail for the following reason: Bail has been revoked C.276 § 58. held pending sentencing  Judge: Cosgrove, Hon. Robert C	127
07/01/2019	Event Result:: Jury Trial scheduled on: 07/01/2019 09:00 AM Has been: Held as Scheduled Comments: Jury Retrurns verdicts on all counts. Bail revoked . Defendant ordered held without bail pending sentencing. Con't to 07/08/2019 for sentence imposition. FTR Rm 1 - S Rothman, Clerk: S Irwin a/c Hon. Robert C Cosgrove, Presiding Appeared: Defendant Marek Janusz Kozubal Jeffrey P Wiesner, Esq., Private Counsel Jennifer Ann McKinnon, Esq., Associate Private Counsel	
07/01/2019	Offense Disposition:: Charge #1 INDECENT A&B ON CHILD UNDER 14, AGGRAVATED c265 §13B½ On: 07/01/2019 Judge: Hon. Robert C Cosgrove By: Jury Trial Guilty Verdict  Charge #2 INDECENT A&B ON CHILD UNDER 14, AGGRAVATED c265 §13B½ On: 07/01/2019 Judge: Hon. Robert C Cosgrove By: Jury Trial Guilty Verdict  Charge #3 INDECENT A&B ON CHILD UNDER 14, AGGRAVATED c265 §13B½ On: 07/01/2019 Judge: Hon. Robert C Cosgrove By: Jury Trial Guilty Verdict  Charge #4 INDECENT A&B ON CHILD UNDER 14, AGGRAVATED c265 §13B½ On: 07/01/2019 Judge: Hon. Robert C Cosgrove By: Jury Trial Guilty Verdict  Charge #5 INDECENT A&B ON CHILD UNDER 14, AGGRAVATED c265 §13B½ On: 07/01/2019 Judge: Hon. Robert C Cosgrove By: Jury Trial Guilty Verdict  Charge #6 INDECENT A&B ON CHILD UNDER 14, AGGRAVATED c265 §13B½ On: 07/01/2019 Judge: Hon. Robert C Cosgrove By: Jury Trial Guilty Verdict  Charge #7 INDECENT A&B ON CHILD UNDER 14, AGGRAVATED c265 §13B½ On: 07/01/2019 Judge: Hon. Robert C Cosgrove By: Jury Trial Guilty Verdict	

	Charge #8 INDECENT A&B ON CHILD UNDER 14, AGGRAVATED c265 §13B½ On: 07/01/2019 Judge: Hon. Robert C Cosgrove By: Jury Trial Guilty Verdict	
07/01/2019	Habeas Corpus for defendant issued to Norfolk County Correctional Center returnable for 07/08/2019 09:00 AM Hearing for Sentence Imposition.	
07/01/2019	Verdict affirmed, verdict slip filed 001 - Guilty as charged (no mandated reporter found)	128
07/01/2019	Verdict affirmed, verdict slip filed 003 -- Guilty as charged (no as to mandated reporter)	129
07/01/2019	Verdict affirmed, verdict slip filed 002 - Guilty as charged (no as to mandated reporter)	130
07/01/2019	Verdict affirmed, verdict slip filed 004 - Guilty as charged (yes as to mandated reporter)	131
07/01/2019	Verdict affirmed, verdict slip filed 005 - Guilty as charged (yes as to mandated reporter)	132
07/01/2019	Verdict affirmed, verdict slip filed 006 - Guilty as charged (yes as to mandated reporter)	133
07/01/2019	Verdict affirmed, verdict slip filed 007 - Guilty as charged (yes as to mandated reporter)	134
07/01/2019	Verdict affirmed, verdict slip filed 008 - Guilty as charged (yes as to mandated reporter)	135
07/01/2019	Commonwealth 's Motion To Impound Transcripts, Exhibits, Items Marked for ID, and Pleadings filed and ENDORSED: ALLOWED (Cosgrove, J.) 07/01/2019	136
07/08/2019	Event Result:: Hearing for Sentence Imposition scheduled on: 07/08/2019 09:00 AM ** Commonwealth enters nolle prosequi to so much of this indictment as alleges that the crime was committed by a mandated reporter. On the lesser included offense of Indecent A& B on a child under 14 (M.G.L.. Chapter 265 sec.13B) sentence is imposed: 3 years probation from and after release from state prison sentence on 1682CR00289 count 002. Conditions: 1. GPS with exclusion zones to be determined upon release 2. stay away/no contact with victim and family 3. Register as sex offender 4. Enter and complete sex offender treatment program 5. No employment with any persons under 16 years of age 6. Pay \$90 VWF 7. Pay monthly PSF Fee 8. Give DNA sample (Cosgrove, J) Attest: B. Roche, a.c. FTR - CR#25 (S.Rothman)  Hon. Robert C Cosgrove, Presiding	
07/08/2019	Defendant Jennifer Ann McKinnon, Esq.'s Motion And Memorandum In Support Of Motion For A Stay Of Execution Of Sentence Pending Appeal. AFTER HEARING, DENIED.	163
07/08/2019	files sentence recommendation Judge: Cosgrove, Hon. Robert C	137
07/08/2019	Defendant warned as to submission of DNA G.L. c. 22E, § 3 Judge: Cosgrove, Hon. Robert C	
07/08/2019	Defendant sentenced:: Sentence Date: 07/08/2019 Judge: Hon. Robert C Cosgrove  Charge #: 2 INDECENT A&B ON CHILD UNDER 14, AGGRAVATED c265 §13B½ State Prison Sentence Not Less Than: 10 Years, 0 Months, 0 Days Not More Than: 10 Years, 0 Months, 1 Days  Charge #: 3 INDECENT A&B ON CHILD UNDER 14, AGGRAVATED c265 §13B½ State Prison Sentence Not Less Than: 10 Years, 0 Months, 0 Days Not More Than: 10 Years,	

	<p>0 Months, 1 Days Served Concurrently Charge # 2 Case 1682CR00289</p> <p>Charge #: 4 INDECENT A&amp;B ON CHILD UNDER 14, AGGRAVATED c265 §13B½ State Prison Sentence Not Less Than: 10 Years, 0 Months, 0 Days Not More Than: 10 Years, 0 Months, 1 Days Served Concurrently Charge # 2 Case 1682CR00289</p> <p>Charge #: 5 INDECENT A&amp;B ON CHILD UNDER 14, AGGRAVATED c265 §13B½ State Prison Sentence Not Less Than: 10 Years, 0 Months, 0 Days Not More Than: 10 Years, 0 Months, 1 Days Served Concurrently Charge # 2 Case 1682CR00289</p> <p>Charge #: 6 INDECENT A&amp;B ON CHILD UNDER 14, AGGRAVATED c265 §13B½ State Prison Sentence Not Less Than: 10 Years, 0 Months, 0 Days Not More Than: 10 Years, 0 Months, 1 Days Served Concurrently Charge # 2 Case 1682CR00289</p> <p>Charge #: 7 INDECENT A&amp;B ON CHILD UNDER 14, AGGRAVATED c265 §13B½ State Prison Sentence Not Less Than: 10 Years, 0 Months, 0 Days Not More Than: 10 Years, 0 Months, 1 Days Served Concurrently Charge # 2 Case 1682CR00289</p> <p>Charge #: 8 INDECENT A&amp;B ON CHILD UNDER 14, AGGRAVATED c265 §13B½ State Prison Sentence Not Less Than: 10 Years, 0 Months, 0 Days Not More Than: 10 Years, 0 Months, 1 Days Served Concurrently Charge # 2 Case 1682CR00289</p> <p>Committed to MCI - Cedar Junction (at Walpole) Credits 8 Days</p>	
07/08/2019	Issued on this date:  Mittimus for Sentence (All Charges) Sent On: 07/08/2019 12:35:16	138
07/09/2019	Notice of appeal filed. 7/8/2019  Applies To: Kozubal, Marek Janusz (Defendant)	139
07/09/2019	Defendant 's Notice of combined motion and memorandum in support of motion for a stay of execution of sentence pending appeal - After hearing, Denied. (Cosgrove, J) dated 7/8/2019. Copies mailed to ADA and Defense	140
07/09/2019	Opposition to to stay execution of sentence pending appeal filed by Norfolk County District Attorney filed 7/8/2019	141
07/09/2019	Commonwealth 's Motion to impound transcripts, exhibits, items marked for ID, and pleadings Allowed (Cosgrove, J) dated 7/8/2019	142
07/09/2019	Commonwealth 's Request for entry of Nolle Prosequi as to so much of count 1 as charges the defendant with being a mandated reporter at the time of the offense - filed 7/8/2019	143
08/02/2019	Endorsement on Motion in limine , (#92.0): ALLOWED as to first conversation involving kissing (Cosgrove, J.) Dated 6/20/2019	
08/02/2019	Commonwealth 's Motion in limine to Exclude Text Messages - DENIED- (Cosgrove, J.) Dated 6/17/2019	144
08/02/2019	Defendant 's Motion for ruling on construction of statute the defendant is Charged under and its relationship to the mandated reporter statute (Received 6/18/2019) ALLOWED - the court agrees with the construction of the statute expressed by Wilson, J. in his memorandum of decision on the defendant's motion (Paper #39) Cosgrove, J.) Dated 6/18/2019	145
08/02/2019	Defendant 's Motion in limine to admit evidence and cross-examine the complainant, s [REDACTED], concerning the complainant's trouble background to explain the relationship between the defendant and the complainant (Received 6/24/2019)	146
08/06/2019	Defendant 's Supplemental memorandum in support of motion to suppress information obtained through use of unauthorized	147

	subpoenas and to suppress defendant's Statements obtained in violation of the 5th and 6th amendments (Dated 6/24/2019)		
08/06/2019	Affidavit of Jeffrey Wiesner in further support of motion to release records from protective order filed on April 5, 2019 (Received 6/24/2019)	148	
08/06/2019	Commonwealth 's Notice Regarding Dexter Southfield Records with Attachments (Received 6/24/2019)	149	
08/06/2019	Opposition to to Defendant's Motion to Release Records from Protective Order----OPPOSITION filed by Norfolk County District Attorney (Received 6/17/2019)	150	
08/06/2019	Commonwealth 's Request for Special Question to the Jury ( Received 6/27/2019)	151	
08/06/2019	Opposition to Page # 151 (Commonwealth's Request for Special Question) ---OPPOSITION filed by Marek Janusz Kozubal (Received 6/28/2019)	152	
08/06/2019	Commonwealth 's Request for Further Inquiry of Prospective Jurors Responding Affirmatively to Question 21 (Received 6/28/2019)	153	
08/06/2019	Request for Jury Instructions	154	
08/06/2019	Defendant 's Request for Preliminary Proposed Jury Instruction Concerning the Charged Crime (Received 6/27/2019)	155	
08/06/2019	Defendant 's Request for preliminary designation of verdict slips ( Received 6/27/2019)	156	
08/06/2019	Commonwealth 's Request for Preliminary Designation of Verdict Slips (Received 6/27/2019)	157	
08/06/2019	Defendant 's Request for curative instruction concerning Commonwealth's witness's testimony that she has sexual assault certification (Received 6/28/2019)	158	
08/06/2019	Defendant 's Motion (Renewed) for Required Finding of not Guilty (Received 6/28/2019) - DENIED, Objection Noted (Cosgrove, J.) Dated 6/28/2019	159	<a href="#">Image</a>
08/07/2019	Notice of appeal from sentence to MCI - Cedar Junction (at Walpole) filed by defendant (Received 7/11/2019)	160	
08/07/2019	Notification to the Appellate Division sent.		
08/19/2019	Docket Note: Sentence Appeal including certified docket sheets, indictments and appearance of counsel sent to Maura Hennigan - Suffolk County Courthouse		
08/30/2019	Attorney appearance On this date David James Nathanson, Esq. added as Appointed - Appeal of Commitment G.L. c. 123 §9(b) for Defendant Marek Janusz Kozubal		
09/03/2019	Commonwealth 's Motion for Continuing Protective Order Regarding Discovery of Digital Video Recordings of Sain Interviews - As the motion is assented to, it is allowed without hearing - So Ordered (Cosgrove, J) c/s ADA & Def. Atty.	161	<a href="#">Image</a>
09/04/2019	Court Reporter ATTORNEY REQUIRED TO ORDER TRANSCRIPTS is hereby notified to prepare one copy of the transcript of the evidence of 07/01/2019 09:00 AM Jury Trial, 06/28/2019 09:00 AM Jury Trial, 06/27/2019 09:00 AM Jury Trial, 06/26/2019 09:00 AM Jury Trial, 06/25/2019 09:00 AM Jury Trial, 06/24/2019 09:00 AM Jury Trial, 06/21/2019 09:00 AM Jury Trial, 06/20/2019 09:00 AM Jury Trial, 06/19/2019 09:00 AM Jury Trial, 06/18/2019 09:00 AM Jury Trial, 06/13/2019 09:00 AM Final Pre-Trial Conference, 06/11/2019 09:00 AM Jury Trial	162	
09/05/2019	Appeal for review of sentence entered at the Appellate Division: Originating Court: Norfolk County Receiving Court: Suffolk County Criminal Case Number: 1984AD222-NO ;		
09/27/2019	Transcript received: TRANSCRIPTS ARE IMPOUNDED  6/13/19 6/18/19		<a href="#">Image</a>

	6/19/19 6/20/19 6/21/19 6/24/19 6/25/19 6/26/19 6/27/19 6/28/19 7/01/19 7/08/19 Filed on 9/26/2019		
12/09/2019	Finding by Court: Pursuant to Remand Order of the Single Justice-Filed on 12/10/19. Copy sent to Appeal court, and emailed to parties.	164	<a href="#">Image</a>
12/27/2019	Notice of docket entry received from Appeals Court Regarding # 2019-J-0510 - Please note that with respect to the (revised) Motion for stay filed by attorney David James Nathanson (Paper #17), on December 19, 2019, the following order was entered on the docket: Re#17 (Revised): Upon review of the trial judge's findings and the defendant's response thereto (#28), the defendant's motion to stay further execution of his sentence is DENIED. (Sacks, J.) dated 12/19/2019 * Notice /Attest/ Cosgrove, J.)	165	<a href="#">Image</a>
01/29/2020	Appeal entered in Appeals Court on 12/31/2019 docket number SJ-2019-J-0510 The Defendant Kozubal Appeals the December 19, 2019 Order of this Court (Sacks, J.) Denying Kozubal's Motion for Stay of Sentence	166	<a href="#">Image</a>
02/11/2020	Defendant 's Motion to modify order of impoundment - Allowed (Cosgrove, J)dated 2/11/20 Copies mailed to ADA and Defense	167	
03/27/2020	Notice of docket entry received from Appeals Court Notice of Assembly of the record	168	<a href="#">Image</a>
03/27/2020	Notice of docket entry received from Appeals Court RE: 2020-P-0029  Filed on 1/15/20	169	<a href="#">Image</a>
04/09/2020	Affidavit of David Nathanson	171	<a href="#">Image</a>
04/09/2020	Defendants Motion to Stay Sentence Pending Appeal (COVID19)  Titled: Renewed Motion to Stay Sentence Due to Changed Circumstances	170	<a href="#">Image</a>
04/10/2020	Opposition to p#170.0 Defendant's renewed motion to stay sentence due to changed circumstances - opposition filed by Norfolk County District Attorney	172	<a href="#">Image</a>
04/10/2020	Scheduled: Judge: Sullivan, Hon. William F Event: Hearing for Review of Other Detainee (COVID19) Date: 04/10/2020 Time: 03:00 PM  Judge: Cosgrove, Hon. Robert C Result: Held - Under advisement		
04/10/2020	Matter taken under advisement: Hearing for Review of Other Detainee (COVID19) scheduled on: 04/10/2020 03:00 PM Has been: Held - Under advisement Hon. Robert C Cosgrove, Presiding		
04/13/2020	Order RE: COVID19  DENIED  Judge: Cosgrove, Hon. Robert C	173	<a href="#">Image</a>
04/13/2020	Endorsement on Renewed Motion to stay sentence due to changed circumstances-After hearing, DENIED, by Cosgrove on 4/10/20 Notice sent out to parties, (#170.0): DENIED		<a href="#">Image</a>
04/13/2020	Opposition to Commonwealth's to renewed motion to stay sentence due to changed circumstances- Filed on 4/10/20 filed by	174	
05/04/2020	Notice of docket entry received from Appeals Court	175	<a href="#">Image</a>

05/06/2020	Notice of docket entry received from Appeals Court RE:2020-P-0029	176	<a href="#">Image</a>
	RE# Treated as a motion to expand the record, the supplemental appendix with documents outside the record with be accepted for filing only. This motion is referred to the panel designated to decide the appeal. Upon filing, the propriety of the supplemental appendix will be referred to the panel designated to decide the appeal		
05/06/2020	Notice of docket entry received from Appeals Court RE:2020-P-0029	177	<a href="#">Image</a>
05/06/2020	Notice of docket entry received from Appeals Court RE:2020-P-0029	178	<a href="#">Image</a>
05/06/2020	Notice of docket entry received from Appeals Court RE:2020-P-0029	179	<a href="#">Image</a>
05/27/2020	Notice of docket entry received from Appeals Court RE: 2020-J-0209	180	<a href="#">Image</a>
	Filed on 5/26/20		
	Please take not that, with respect to the motion for expedited ruling, filed by Marek Kozubal. (Paper #5), On May 15, 2020, the following order was entered on the docket of the above case:		
	RE: #5 ALLOWED. (Wolohojian, J.) *Notice		
05/27/2020	Notice of docket entry received from Appeals Court RE: 2020-J-0209	181	<a href="#">Image</a>
	Filed on 5/26/20		
	Memorandum and Order: on July 1, 2019- Stay of execution of Sentence:		
	I conclude that the trial judge did not abuse his discretion in denying the motion to stay and, after exercising my independent review and discretion, I reach the same conclusion here. So Ordered. (Wolohojian, J.). Notice/Attest/Cosgrove, J.		
05/27/2020	MEMORANDUM & ORDER:	182	<a href="#">Image</a>
	Filed on 5/26/20		
	Judge: Connors, Hon. Thomas A		
	Judge did not abuse his discretion in denying the motion to stay and, after exercising my independent review and discretion, I reached the same conclusion here. SO ORDERED. By Judge (Wolohojian,) on May 15, 2020		
05/28/2020	Defendant 's Request for juror information-Filed on 5/28/20	183	<a href="#">Image</a>
05/28/2020	Affidavit of of Counsel-David J. Nathanson-Filed on 5/28/20	184	<a href="#">Image</a>
05/28/2020	Endorsement on Request for juror information-Commonwealth given 30 days t respond(Judge Cosgrove) Attest: JMD on 5/28/20, (#183.0): Other action taken		<a href="#">Image</a>
06/25/2020	Opposition to to Defendant's Request for Non-Empanelled Venire Member Names filed by Norfolk County District Attorney (rec'd 6/24/2020)	185	<a href="#">Image</a>
08/13/2020	ORDER: Ruling on Defendant's request for Juror Information-by Judge Cosgrove on 8/10/20	186	<a href="#">Image</a>
	The motion is allowed. The Clerk shall provide copies of the names of all jurors for the dates of June 18-20 of 2019, and their Juror numbers, to both Commonwealth and Defense		
	Copy of Order given to Chief Fitzgerald on 8/13/20 to provide Jury names and numbers		
08/24/2020	ORDER: of Single Justice entered May 15, 2020, denying motion to stay sentence, AFFIRMED-Filed on 8/24/20	187	<a href="#">Image</a>
09/09/2020	ORDER: REVISED Ruling on Defendant's Request for Juror Information - The motion is ALLOWED. The Office of Jury Commissioner shall provide the juror numbers to the Clerk of Court. The Clerk shall then provide	188	<a href="#">Image</a>

	copies of the names of all jurors for the dates of June 18-20, 2019, and their juror numbers, to both the defendant and the Commonwealth. Address and birthdate information shall not be provided. (Cosgrove, J.) dated 9/8/2020		
10/19/2020	Clarification / Correction of the docket:  No. 175- with respect to the Motion of Appellant to stay appellate proceedings filed for Marek Kozubal (Paper no. 15) the following order was entered on the docket: The appellant is granted leave to file, and the trial court to consider, a renewed motion to stay execution of sentence. This appeal is to proceed and will be considered by a panel in due course.		
10/23/2020	Notice of docket entry received from Appeals Court RE: No.2020-J-209 - Please note that, with respect to the Other motion for misc relief (Motion to file nonconforming Stay) filed for Marek Kozubal by attorney Nathanson. (Paper #3) on May 15, 2020 it is Ordered: RE# 3: ALLOWED (Wolohojian, J.) . *Notice	189	<a href="#">Image</a>
10/23/2020	MEMORANDUM & ORDER:  RE: 20-P-601, Pursuant to Rule 1:28 of a single justice of Appellate Court DENYING an emergency motion to stay execution of sentence pending appeal. For the reasons that follow, we AFFIRM the order. (Sullivan, Lemire & Hand, JJ.) attest: Joseph F. Stanton Entered June 8, 2020 - SEE Memorandum and Order  Judge: Cannone, Hon. Beverly J	190	<a href="#">Image</a>
10/26/2020	Notice of docket entry received from Appeals Court RE: 2020-P-0601 - Notice of Rescript dated : August 6, 2020	191	<a href="#">Image</a>
10/26/2020	Notice of docket entry received from Appeals Court RE: No. 2020-P-0029 - Notice of Pre-Scheduling and Unavailability to Argue	192	<a href="#">Image</a>
11/03/2020	Commonwealth, Defendant 's Joint Motion to Include and impound Clerk's List of Jurors in Record-Filed on 11/3/20	193	<a href="#">Image</a>
11/19/2020	Endorsement on Motion to Include and Impound List of Jurors in Record, (#193.0): ALLOWED  Judge: Cosgrove, Hon. Robert C		
11/24/2020	Notice of docket entry received from Appeals Court RE: No. 2020-P-0029 - Notice of Rescript dated November 23, 2020	194	<a href="#">Image</a>
11/24/2020	ORDER: In the case no. 20-P-29 - Order of single justice denying motion for stay of execution of sentence AFFIRMED. By the Court, Joseph F. Stanton, Clerk - dated October 26, 2020	195	<a href="#">Image</a>
11/24/2020	MEMORANDUM & ORDER:  RE: 20-P-29 from Appeals Court Pursuant to Rule 23.0 - Order of single justice denying motion for stay of execution of sentence AFFIRMED. (Desmond, Ditkoff & Singh, JJ) We Discern No Abuse of Discretion Joseph F. Stanton, Clerk - Entered October 26, 2020 SEE Memorandum and Order  Judge: Stanton, Joseph	196	<a href="#">Image</a>
11/27/2020	Docket Note: Jurors List Filed on 11/20/20		
12/04/2020	Notice to Clerk of the Appeals Court of Assembly of Record	197	
12/04/2020	Notice of assembly of record sent to Counsel	198	
12/04/2020	Appeal: Statement of the Case on Appeal (Cover Sheet).	199	
12/07/2020	Docket Note: Appeal sent out to appeals court and all parties involved on 12/7/20 by Electronically.  Jury List *IMPOUNDED*  Did not send IMPOUNDED Transcripts to Defense and ADA-Need Court Order to release.		
12/11/2020	Notice of appeal filed. Notice of Entry RE: No. 2020-P-1365 - In accordance with Massachusetts Rule of Appellate Procedure 10(a)(3), the case was entered in Appeals Court on 12/7/2020 (rec'd 12/10/2020)	200	<a href="#">Image</a>

Applies To: Kozubal, Marek Janusz (Defendant)

We are still experiencing issues with viewing images on dockets and continue to work on a resolution. We apologize for the inconvenience. ✖

**APPEALS COURT**  
**Full Court Panel Case**  
**Case Docket**

**COMMONWEALTH vs. MAREK J. KOZUBAL**  
**THIS CASE CONTAINS IMPOUNDED MATERIAL OR PID**  
**2020-P-1365**

**CASE HEADER**

<b>Case Status</b>	Red & Blue briefs filed	<b>Status Date</b>	02/02/2021
<b>Nature</b>	Crime: Sexual Offense	<b>Entry Date</b>	12/07/2020
<b>Appellant</b>	Defendant	<b>SJ Number</b>	
<b>Brief Status</b>		<b>Case Type</b>	Criminal
<b>Panel</b>		<b>Brief Due</b>	
<b>Citation</b>		<b>Argued/Submitted</b>	
<b>Lower Court</b>	Norfolk Superior Court	<b>Decision Date</b>	
<b>Lower Ct Judge</b>	Robert C. Cosgrove, J.	<b>TC Entry Date</b>	09/09/2016
<b>FAR Number</b>		<b>SJC Number</b>	

**INVOLVED PARTY**

**Commonwealth**  
 Plaintiff/Appellee  
 Red brief & appendix filed  
 1 Enl, 20 Days

**Marek J. Kozubal**  
 Defendant/Appellant  
 Blue brief & appendix filed

**ATTORNEY APPEARANCE**

[Pamela Alford, A.D.A.](#)  
[Tracey A. Cusick, A.D.A.](#)

[David J. Nathanson, Esquire](#)

**DOCKET ENTRIES**

<b>Entry Date</b>	<b>Paper</b>	<b>Entry Text</b>
12/07/2020		Case partially impounded pursuant to M.G.L. c. 265, 24C
12/18/2020		ADDITIONAL Transcript Volume: 06/11/2019 - Final Pretrial Conference.
12/07/2020		Transcript Volume: 06/13/2019 - UPDATED Motions Hearing (IMPOUNDED) .
12/07/2020		Transcript Volume: 06/13/2019 - Motions Hearing (IMPOUNDED) .
12/07/2020		Transcript Volume: 06/18/2019 - Jury Trial Day 1 (IMPOUNDED) .
12/07/2020		Transcript Volume: 06/19/2019 - Jury Trial Day 2 (IMPOUNDED) .
12/07/2020		Transcript Volume: 06/20/2019 - Jury Trial Day 3 (IMPOUNDED) .
12/07/2020		Transcript Volume: 06/21/2019 - Jury Trial Day 4 (IMPOUNDED) .
12/07/2020		Transcript Volume: 06/24/2019 - Jury Trial Day 5 (IMPOUNDED) .
12/07/2020		Transcript Volume: 06/25/2019 - Jury Trial Day 6 (IMPOUNDED) .
12/07/2020		Transcript Volume: 06/26/2019 - Jury Trial Day 7 (IMPOUNDED) .
12/07/2020		Transcript Volume: 06/27/2019 - Jury Trial Day 8 (IMPOUNDED) .
12/07/2020		Transcript Volume: 06/28/2019 - Jury Trial Day 9 (IMPOUNDED) .
12/07/2020		Transcript Volume: 07/01/2019 - Jury Trial Day 10 (IMPOUNDED) .
12/07/2020		Transcript Volume: 07/08/2019 - Sentencing (IMPOUNDED) .

12/07/2020	#1	Lower Court Assembly of the Record Package
12/07/2020	#2	Notice of entry sent.
12/09/2020	#3	Docketing Statement filed for Marek J. Kozubal by Attorney David James Nathanson.
12/09/2020	#4	MOTION to file non-conforming brief filed for Marek J. Kozubal by Attorney David James Nathanson.
12/09/2020	#5	Appellant brief filed for Marek J. Kozubal by Attorney David James Nathanson.
12/09/2020	#6	Appendix filed for Marek J. Kozubal by Attorney David James Nathanson.
12/11/2020		RE#4: Denied. Appellant is to file a brief in compliance with the word or page count requirements in MRAP, due on or before the current due date for his brief, 01/18/2021. (Englander, J.) . *Notice.
12/14/2020	#7	Notice of appearance filed for Commonwealth by Attorney Tracey Cusick.
12/14/2020	#8	MOTION to reconsider filed for Marek J. Kozubal by Attorney David James Nathanson.
12/15/2020		RE#8: After reconsideration, the relief requested in Paper #14 is allowed. The defendant's brief and appendix are accepted for filing (Englander, J.). *Notice.
12/30/2020	#9	MOTION of Appellee to extend brief due date filed for Commonwealth by Attorney Tracey Cusick.
12/30/2020	#10	Response to paper #9 filed for Marek J. Kozubal by Attorney David James Nathanson.
12/31/2020		RE #9 & 10: The Commonwealth has moved for an additional 30 days to file its brief. The defendant has opposed the motion. While the court is aware of the unusual demands presented by the pandemic, and is cognizant of the Commonwealth's other constraints as detailed in its motion to enlarge time to file its brief, the defendant points out in his opposition that the Commonwealth has had a copy of his brief since 11/04/2020, and that counsel alerted the Commonwealth that he would oppose any request for enlargement made by the Commonwealth. Moreover, the defendant is incarcerated and the Commonwealth twice opposed his motion to stay execution of sentence. In its response to the motions to stay, the Commonwealth has already substantively responded to two issues raised in the defendant's brief. Accordingly, the Commonwealth's motion to enlarge time to file its brief is allowed to the extent the brief is to be filed on or before 02/02/2021. No further enlargements. (Englander, J.). Notice sent.
02/02/2021	#11	Motion to Transmit Impounded Exhibit filed for Commonwealth by Attorney Tracey Cusick.
02/02/2021	#12	Notice of rejection of e-filed brief/appendix of Commonwealth as noncompliant for the reasons indicated on the checklist: 3/4 (All Appendices). Accordingly, on or before 02/05/2021, you must correct the above-listed nonconformities and submit a conforming brief and/or appendix.*Notice sent.
02/02/2021	#13	Appellee brief filed for Commonwealth by Attorney Tracey A. Cusick.
02/02/2021	#14	IMPOUNDED Supplemental Appendix Vol I of III filed for Commonwealth by Attorney Tracey A. Cusick.
02/02/2021	#15	IMPOUNDED Supplemental Appendix Vol II of III filed for Commonwealth by Attorney Tracey A. Cusick.
02/02/2021	#16	IMPOUNDED Supplemental Appendix Vol III of III filed for Commonwealth by Attorney Tracey A. Cusick.

As of 02/12/2021 11:15am